

SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

SYLVESTER TRAYLOR *v.* STATE OF CONNECTICUT et al., SC 19977
Judicial District of Hartford

Medical Malpractice; Whether Plaintiff has Standing to Challenge Constitutionality of General Statutes § 52-190a; Whether Declaratory Judgment Claim Barred by Sovereign Immunity; Whether § 52-190a Violates Plaintiffs' Constitutional Rights. General Statutes § 52-190a (a) requires that a plaintiff in a medical malpractice action obtain and attach to the complaint "a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence. . . ." Section 52-190a (c) provides that "[t]he failure to obtain and file the written opinion required by subsection (a) . . . shall be grounds for the dismissal of the action." In 2006, the plaintiff brought a medical malpractice action against his wife's psychiatrist following his wife's suicide, and the complaint did not include the opinion letter required by § 52-190a (a). Although the plaintiff subsequently obtained an opinion letter, the trial court dismissed the action on the ground that no opinion letter was attached to the original complaint. The plaintiff brought several lawsuits challenging the dismissal of the medical malpractice action. Those lawsuits were resolved against the plaintiff, and he brought the present action against, among others, the state of Connecticut, the Appellate Court, and several Superior Court judges who presided over the previous lawsuits (the state defendants), seeking a judgment declaring that § 52-190a is unconstitutional. Specifically, the plaintiff claimed that, because obtaining an opinion letter imposes a financial burden and other obstacles on plaintiffs seeking to bring medical malpractice claims, § 52-190a violates plaintiffs' rights to access to the courts, due process, and equal protection. The trial court granted the state defendants' motion to dismiss the claims asserted against them, ruling that the plaintiff's claims for injunctive and declaratory relief were barred by sovereign immunity and furthermore that the defendant judges enjoyed absolute judicial immunity from the plaintiff's claims. The trial court also ruled that, to the extent that the plaintiff claimed here that any previous judgments of the Superior Court or of the Appellate Court should be disturbed or overturned, those claims were nonjusticiable. Finally, the trial court found that the plaintiff lacked standing to challenge the constitutionality of § 52-190a because he had, in fact, obtained the opinion letter required by

the statute. The plaintiff appeals, claiming that the trial court wrongly concluded that (1) he lacked standing to assert his declaratory judgment claim challenging the constitutionality of § 52-190a, and (2) his declaratory judgment claim was barred by sovereign immunity. The plaintiff also asks that the Supreme Court declare that § 52-190a is unconstitutional.

GENE NEWLAND *v.* COMMISSIONER OF CORRECTION, SC 19987
Judicial District of Tolland

Habeas Corpus; Whether Prejudice Prong of “Cause and Prejudice” Standard for Obtaining Review of Procedurally Defaulted Claim is Presumptively Satisfied Where Petitioner was Denied Right to Counsel. The petitioner was convicted of sexual assault and risk of injury. The petitioner did not appeal his conviction, but he brought this habeas corpus action claiming that he was denied his right to counsel when, prior to the criminal trial, he was wrongly deemed ineligible for the services of a public defender due to his ownership of real property. The respondent argued that the petitioner had procedurally defaulted as to that claim as he had never raised it before the trial court or on appeal. In addressing the respondent’s claim of procedural default, the habeas court applied the “cause and prejudice” standard established in *Wainwright v. Sykes*, 433 U.S. 72 (1977), which requires that a petitioner make a showing of cause for failure to preserve the claim and a showing that he was prejudiced as a result of the impropriety claimed in the habeas petition. The habeas court found that the petitioner met his burden of proving cause for failing to challenge the public defender’s determination that he was ineligible for the services of a public defender by “appealing” that determination to the trial court pursuant to General Statutes § 51-297 (g) and Practice Book § 37-6 (a). The court noted that both the public defender and the judge that presided over the criminal trial had wrongly suggested to the petitioner that the public defender’s determination that the petitioner’s home ownership rendered him ineligible for the services of a public defender was not subject to judicial review. Having found that the petitioner’s right to counsel was violated by the wrongful denial of legal assistance, the habeas court ruled that the petitioner did not have to prove resulting prejudice because prejudice could be presumed. The court cited *Dennis v. Commissioner of Correction*, 134 Conn. App. 520 (2012), which held that actual prejudice is presumed when a petitioner’s right to counsel is violated and that any conviction obtained after the wrongful denial of legal assistance must

be reversed. The habeas court granted the habeas petition, vacated the petitioner's conviction and remanded the case to the trial court for further proceedings. The respondent appeals, claiming that the habeas court wrongly concluded that the prejudice prong of the "cause and prejudice" standard was presumptively satisfied here. The respondent contends that the inquiry into whether a petitioner can satisfy the "cause and prejudice" standard to obtain review of a procedurally defaulted claim is separate and distinct from the inquiry into whether the petitioner can prevail on the merits of the claim, and that the habeas court conflated the two inquiries in concluding that the petitioner did not need to prove prejudice in order to obtain review of the merits of his claim.

ROBERT J. MCKAY *v.* STUART LONGMAN et al., SC 20013/20014
Judicial District of Stamford-Norwalk at Stamford

Corporations; Whether Trial Court Properly Applied Reverse Piercing of the Corporate Veil Doctrine; Whether Plaintiff Lacked Standing to Challenge Enforceability of Mortgage; Whether Defendant's Property Transfers Fraudulent. In 1996, the plaintiff obtained a \$3,964,047 judgment against the defendant Stuart Longman in New York. The judgment remains unsatisfied. In 2010, the plaintiff discovered that Longman had purchased property in Greenwich. The plaintiff learned that Longman held title to the Greenwich property for seven days before he transferred the property to the defendant Lurie Investments, which Longman managed, and that Lurie later sold the property. The plaintiff also learned that title to Longman's property in Ridgefield had been transferred back and forth several times in 2007 between Longman and the defendant Sapphire Development, which Longman managed. The plaintiff brought this action, alleging fraudulent transfer as to the Ridgefield property and the Greenwich property and seeking to apply the "reverse piercing of the corporate veil" doctrine to several businesses managed by Longman in order to access their assets for purposes of satisfying the New York judgment. The defendants to this action include Longman, Lurie, Sapphire, and the other businesses that the plaintiff sought to reverse pierce – 2 Great Pasture Road Associates, R.I.P.P., Solaire Development, Solaire Management, Solaire Funding, and W.W. Land Company (the Longman defendants). Hudson City Savings Bank (HCSB), which loaned \$2.5 million to Sapphire and took a mortgage on the Ridgefield property as security, was also named as a defendant to the action. The case was tried to the court. In its decision, the trial court noted that, in

alleging fraudulent transfer as to the Ridgefield property, the plaintiff sought a declaratory judgment that the HCSB mortgage was void and therefore did not encumber the property. It determined that the plaintiff lacked standing to challenge the mortgage as he was not a party to the mortgage transaction. The trial court then found in favor of the plaintiff on his fraudulent transfer claims as to the Ridgefield and Greenwich properties. It further found in favor of the plaintiff on his reverse piercing claims as to Lurie, Sapphire, 2 Great Pasture Road Associates, and R.I.P.P., concluding that those businesses were shells used by Longman solely for the purpose of moving assets and money. The trial court ruled against the plaintiff, however, on his reverse piercing claims as to the Solaire companies and W.W. Land, concluding that the plaintiff had abandoned his reverse piercing claim as to W.W. Land and that the Solaire companies appeared to be engaged in legitimate corporate activities. Both the plaintiff and the Longman defendants have appealed from the trial court's judgment. The plaintiff's appeal asks the Supreme Court to decide whether the trial court properly determined that the plaintiff lacked standing to challenge the HCSB mortgage and properly determined that W.W. Land and the Solaire companies were not subject to reverse piercing. The Longman defendants' appeal asks the Supreme Court to decide whether the trial court properly found against the Longman defendants on the plaintiff's fraudulent transfer and reverse piercing claims as to Lurie, Sapphire, 2 Great Pasture Road Associates, and R.I.P.P.

JOHN GIROLAMETTI, JR., et al. *v.* MICHAEL HORTON ASSOCIATES, INC., et al. SC 20032/20033/20036

JOHN GIROLAMETTI, JR., et al. *v.* VP BUILDINGS, INC., et al., SC 20034/20035

Judicial District of Waterbury

**Res Judicata; Whether Plaintiffs' Claims Against Subcontractors Barred by Res Judicata Because Subcontractors in Priv-
ity with General Contractor and Where Plaintiffs' Claims
Against General Contractor Were Decided Against Plaintiffs in
Prior Litigation.** These appeals arise from disputes regarding the construction of an expansion to a Party Depot store located in Danbury. The plaintiffs are the owners of the store, and they brought two actions against the subcontractors (the subcontractor defendants) who worked on the project, alleging various claims relating to the quality of the work performed, and the actions were consolidated. The general contractor, Rizzo Corporation (Rizzo), was made an apportionment defendant,

and the plaintiffs asserted claims against it. Prior to the commencement of the underlying actions, Rizzo had sought to resolve its dispute with the plaintiffs concerning extra work and costs incurred during the project through arbitration. The arbitrator issued an award in favor of Rizzo, and that award was confirmed by the Superior Court. The trial court here rendered summary judgment in Rizzo's favor, finding that the plaintiffs' claims against it were barred by the doctrine of res judicata because they were previously resolved against the plaintiffs in the binding arbitration. The trial court denied motions for summary judgment filed by the subcontractor defendants, finding that, unlike Rizzo, they could not avail themselves of the doctrines of collateral estoppel or res judicata to avoid the plaintiffs' claims because they were not parties to the arbitration proceeding and because they were not in privity with Rizzo. The subcontractor defendants appealed, and the Appellate Court (173 Conn. App. 630) reversed the judgments, finding that the plaintiffs' claims against the subcontractor defendants were barred by res judicata. The Appellate Court found that Rizzo and the subcontractor defendants shared the same legal rights binding them in privity and that all of the plaintiffs' claims against the subcontractor defendants could have been made against Rizzo in the arbitration proceeding. The plaintiffs filed petitions for certification to appeal the Appellate Court's judgments as to each of the five subcontractor defendants. The Supreme Court granted the petitions, and it will decide whether the Appellate Court properly reversed the judgments denying the subcontractor defendants' motions for summary judgment on determining that the subcontractor defendants were in privity with Rizzo and therefore that the plaintiffs' claims against them were barred by res judicata.

DIANE BOISVERT et al. v. JAMES GAVIS, SC 20049/20053

Judicial District of Windham

Visitation with Minor Child; Whether General Statutes § 46b-59 Requires that an Order Granting Visitation Direct that Party Granted Visitation Must Abide by Parents' Decisions; Whether § 46b-59 Unconstitutional in Failing to Protect Parent's Fundamental Right to Raise Child. The plaintiffs, Diane and Thomas Boisvert, brought this action pursuant to General Statutes § 46b-59 seeking visitation with their maternal grandson. The child's mother is deceased, and the child is in the custody of his father, defendant James Gavis. The trial court granted visitation rights to the plaintiffs, concluding that the requirements of § 46b-59 had been satisfied because

there was clear and convincing evidence that a parent-like relationship existed between the plaintiffs and the child and that the denial of visitation would cause the child real and significant harm. The defendant subsequently filed a motion for order seeking that the trial court order the plaintiffs to honor his parental decisions during their visits with the child, including his request that the child have no contact with a maternal aunt. The trial court denied the motion for order, concluding that there was no evidence that the plaintiffs' noncompliance with the defendant's parenting decisions had been contrary to the child's best interests. With these appeals, the defendant challenges the order granting the plaintiffs visitation and the order denying his motion for order. He argues that the trial court erred in issuing the visitation order because § 46b-59 implicitly requires that a visitation order direct that a party granted visitation of a minor child not override a parent's decisions as to the way the child should be raised and that the visitation order here contained no such provision. The defendant claims that the statute's implicit requirement stems from the language of § 46b-59 (e), which provides that, if a court grants visitation of a minor child, "the court shall set forth the terms and conditions of visitation including . . . any other terms and conditions that the court determines are in the best interests of the minor child" The defendant argues that, because fit parents are presumed to act in the best interests of their children, a visitation order that fails to affirmatively protect a parent's decision-making authority cannot be deemed to serve the child's best interests. Alternatively, the defendant argues that " 46b-59 is unconstitutional as applied because it allowed the court to issue a visitation order that failed to protect his fundamental right to make child rearing decisions and because it allowed the court to order visitation far in excess of the amount necessary to advance the state's compelling interest of preventing harm to the child.

IN RE JACOB W., et al, SC 20063
Juvenile Matters at Rockville

Termination of Parental Rights; Whether Appellate Court Properly Reversed Judgment that Denied Custodian's Petition to Terminate Incarcerated Father's Parental Rights on Ground of Lack of an Ongoing Parent-Child Relationship. The maternal grandmother of three minor children was granted custody of the children after the children's mother and father were arrested and charged with sexually assaulting other minors. The grandmother filed petitions to terminate the parental rights of both the parents. As to the father,

the grandmother alleged the statutory grounds of abandonment and the lack of an ongoing parent-child relationship, claiming that the father had had no contact with the children since he was incarcerated in 2016. While the mother consented to the termination of her parental rights, the father opposed the petition seeking termination of his rights. The trial court denied the petition to terminate the father's parental rights, concluding that the grandmother had failed to prove either abandonment or the lack of an ongoing parent-child relationship. The trial court also suggested that the grandmother had interfered with the father's efforts to maintain an ongoing parent-child relationship with the children. The grandmother appealed, and the Appellate Court (178 Conn. App. 195) reversed the judgment and remanded the case for a new trial, finding that the trial court applied an incorrect legal test in determining that the grandmother had not proved the lack of an ongoing parent-child relationship. The Appellate Court noted that the primary inquiry in determining whether an ongoing parent-child relationship exists under § 45a-717 is whether the child has any present positive feelings for the parent, but that the trial court here instead focused on the father's efforts to maintain a relationship with the children. The Appellate Court concluded that the trial court could not legally and logically find both that an ongoing parent-child relationship existed and that the grandmother had, through her interference, prevented such a relationship from existing. It emphasized that the initial test for determining whether there is an ongoing parent-child relationship is whether the child has any present positive feelings for the parent and that a trial court may consider the question of interference with a noncustodial parents efforts to maintain a parent-child relationship only if the child does not have such feelings. Finally, the Appellate Court held that the trial court's findings were fatally inconsistent in that, although the court found in the adjudicatory phase of the proceeding that the grandmother interfered with the parent-child relationship by, among other things, failing to facilitate contact between the father and the child, the court subsequently found in the dispositional phase of the proceeding that there was no evidence that the father was prevented from maintaining a meaningful relationship with the children. The father was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly reversed the trial court's judgment on determining that it was legally and logically inconsistent.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE v. RICKY OWEN, SC 20127

Judicial District of Fairfield

Criminal; Whether Trial Court Properly Determined that Material Witness was “Disabled” for Purposes of Nolle Prosequi Statute, General Statutes § 54-56b. The defendant was charged with multiple crimes in connection with an incident in which he allegedly choked his girlfriend, J.H., until she lost consciousness and punched her in the face while telling her that he would kill her. On the day before the trial was scheduled to begin, J.H. informed the state that she would not be traveling from her home in North Carolina to testify in Connecticut because she was afraid of the defendant. The state entered a nolle prosequi, the functional equivalent of a motion that the charges be dismissed without prejudice to the state’s bringing them at a later time, claiming that it could not meet its burden of proof without J.H.’s testimony. The defendant objected and moved that the charges be dismissed with prejudice, and General Statutes § 54-56b provides that a nolle prosequi may not enter if the accused objects and demands a judgment of dismissal, except “upon a representation to the court by the prosecuting official that a material witness has died, disappeared or become disabled . . . and that a further investigation is necessary.” The state claimed that J.H. was “disabled” within the meaning of the statute because she was a victim of domestic violence who was afraid of the defendant and that she was “mentally unable” to come to Connecticut to testify. The state also suggested that, with the benefit of support and counseling, J.H. might be able to testify at some future time. The trial court accepted the state’s nolle prosequi and denied the defendant’s motion to dismiss, finding that the state had not abused its discretion in a manner contrary to public policy by entering the nolle prosequi on the ground that J.H. was disabled for purposes of § 54-56b. The defendant appeals, claiming that the trial court wrongly denied his motion to dismiss and accepted the nolle on determining that J.H., a material witness, was “disabled” within the meaning of § 54-56b. The defendant also claims that the prosecutor’s entry of a nolle constituted a manifest abuse of the state’s discretion where the state did not avail itself of an available procedure for compelling the attendance at trial of a material out-of-state witness.

RECLAIMANT CORP. v. WILLIAM J. DEUTSCH et al., SC 20133

Judicial District of Stamford-Norwalk at Stamford

Conflict of Laws; Whether Trial Court Properly Construed Choice of Law Provision in Partnership Agreement as Dictating that Delaware Statute of Limitations Applied to Action. The

defendants, William J. Deutsch and Laurence B. Simon, are Connecticut residents and former limited partners in SV Special Situations Fund LP, a limited partnership formed under Delaware law. The plaintiff is the transferee of the limited partnership's right to recover against the defendants. The plaintiff brought this action alleging that the defendants were unjustly enriched when the limited partnership mistakenly distributed to them over \$8 million on their withdrawals from the partnership in 2008. The defendants moved for summary judgment. They emphasized that the limited partnership agreement provided that "all rights and liabilities of the parties" to the agreement would be governed by Delaware law and that, under Delaware law, the action was untimely because it was not brought within three years from the date of the distributions to the defendants. The trial court agreed and rendered judgment for the defendants, determining that the choice of law provision in the limited partnership agreement was clear and unambiguous regarding the applicability of Delaware law. It rejected the plaintiff's claim that, in the absence of an express statement to the contrary, a choice of law provision that elects the law of a particular state applies only to substantive issues and not to procedural issues such as the applicable statute of limitations. The plaintiff asserted that, under Connecticut law, this action was timely brought. The plaintiff appeals from the judgment in favor of the defendants. The plaintiff claims that the trial court wrongly applied Delaware law by virtue of the choice of law provision in the limited partnership agreement and wrongly granted summary judgment for the defendants on the ground that the action was untimely under Delaware law.

STATE *v.* KENNETH M. WEATHERSPOON, SC 20134
Judicial District of New London

Criminal; Prosecutorial Impropriety; Whether Prosecutor's Argument that, by Virtue of his Presence at Trial, Defendant Could Tailor his Testimony to Evidence Violated State Constitution. The defendant was charged with sexual assault in a cohabitating relationship and assault in the third degree, and he testified at trial. During the state's closing argument, the prosecutor told the jury that the defendant's testimony was "entirely self-serving [and] with the benefit of hearing all the testimony that came before [the defendant testified]." The defendant was convicted of the crimes, and he appeals. He contends that, during closing argument, the prosecutor made a "generic tailoring argument," that is, one where the prosecutor attacks a defendant's credibility by drawing the jury's attention to the fact

that, by virtue of his presence at trial, the defendant has the opportunity to tailor his testimony to respond to other evidence and testimony that were presented at trial. The defendant acknowledges that the United States Supreme Court has held that generic tailoring arguments do not violate the federal constitution, but he now urges the Connecticut Supreme Court to hold that generic tailoring arguments violate a defendant's rights under the Connecticut constitution to be present at trial, to due process and to a fair trial. In the alternative, the defendant argues that the Supreme Court should prohibit such closing arguments under its supervisory powers or conclude that the state's argument constituted plain error. The defendant also claims on appeal that the prosecutor improperly suggested to the jury that, in order to find the defendant not guilty, the jury had to find that other witnesses had lied.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

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